IN THE

Supreme Court of the United States

October Term, 1978
No. 78-1720

WORLDWIDE CHURCH OF GOD, INC., *et al.*,

Petitioners,

vs.

THE STATE OF CALIFORNIA,

Respondent.

Petitioners' Reply Brief in Support of Petition for Writ of Certiorari.

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SUBJECT INDEX

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Introductory Statement.

The State of California's Opposition to the Petition is primarily devoted to obscuring or avoiding the major constitutional issues raised by the State's attempted domination of the Worldwide Church of God. Moreover, the Opposition is filled with incorrect or misleading statements of fact. In particular, the State Attorney General's reiteration on information and belief of misconduct charges which have already been proven false is unfair and unjustified. In truth, the Attorney General knows there has been and is no misappropriation of Church assets warranting the State's massive intervention into Church affairs. In truth, the State has inflicted

and continues to inflict grievous injury on the Church and is determined either to control the Church or destroy it. The State is presently achieving both ends in its courts.

In this Reply, we shall focus on the following issues:

1. The constitutional issues presented are ripe for review by this Court and the finality rule is fully satisfied. The State has asserted unlimited jurisdiction over the Church, and has inflicted and continues to inflict irreparable injury. This is not the first case in which the State has so acted; but if relief is not forthcoming in this case it is unlikely any other religious organization will be able to resist such unconstitutional conduct. The highest state courts have endorsed the State's gross violations of Petitioners' rights under the First Amendment. Nothing remains but the complete destruction of the Church.

2. The true nature of this action involves the exercise by the State of a general supervisory power over the affairs of religious organizations in California. Incredibly, in the State's view this power comprehends rights to inspect at will all Church documents and records, to determine whether Church expenditures are for proper religious purposes, to remove Church leaders from positions of effective authority, and to restructure the form of Church governance. There is no compelling state interest warranting such a wholesale invasion of Petitioners' First Amendment rights. This Court's decisions mandate termination of the State takeover of the Worldwide Church of God.

I

THE CONSTITUTIONAL ISSUES ARE PROPERLY BEFORE THIS COURT AFTER DENIAL OF ANY RELIEF BY THE STATE'S HIGHEST COURTS. THE FINALITY RULE IS SATISFIED ON BOTH TECHNICAL GROUNDS AND MORE PRAGMATIC GROUNDS APPLICABLE WHERE A REFUSAL TO REVIEW THREATENS IRREPARABLE INJURY TO FUNDAMENTAL CONSTITUTIONAL RIGHTS.

A. The State Misconceives the Issues and Facts.

The State of California would have this Court believe that with the stay of the second receivership imposed on the Church all immediacy for review disappeared.[1] This, of course, ignores the basic fact that the California courts have fully and finally upheld the State's assertion of jurisdiction over the Church and endorsed the State's right to impose a receivership in furtherance of its purported general supervisory power over the affairs of religious organizations. How the State exercises this jurisdiction is only a secondary question because however it does so religious freedoms suffer. If the State, by arbitrarily labelling the Church a "charitable trust," may at its whim (1) compel the Church to throw open its books and records and account for all income and expenditures, (2) decide whether Church assets are being used for proper religious purposes, (3) replace Church leadership because their views of "God's work" differ from the State's or because they resist submission to the State or because their religious beliefs dictate a form of religious polity contrary to the State's preference, then the State's use of a receiver to accomplish

[1]Similarly, the State would have this Court believe that the receivership was reimposed as a result of repudiation of some assurance. In fact, Petitioners made no assurances with respect to the injunction entered by the court. (R.T. March 1, p. 5.)

these goals would hardly matter. The State misunderstands the nature of the case if it believes Petitioners object only to the manner in which the State pursues its infringement of religious liberty. On the contrary, Petitioners challenge the very premise that the State has a general supervisory power over the affairs of religious organizations.

The State's Opposition totally ignores the following undisputed facts:

a. This action has already cost the Church more than $5 million in losses directly resulting from the receivership, vital Church programs have been crippled, and the mere existence of the receivership order and this lawsuit have a continuing and severe adverse impact on the Church. For example, the Church has been unable to pledge collateral and borrow money in the normal course of business, its credit rating remains impaired so that it is forced to deal on a cash-and-carry basis with the media, and other aspects of its operation vital to its religious mission are impaired. (See Declaration of Willis J. Bicket, Appendix C to Petition for Certiorari.)

b. The Attorney General's savage assault on the Church and his efforts to force disclosure of all Church records and information, originally commenced through the receiver, continue unabated in discovery. For example, the State has noticed the depositions of most of the individual Petitioners, served them with sweeping notices to produce documents, and is now seeking a contempt citation and incarceration against Petitioner Stanley Rader based on his failure to comply with their

discovery demands.[2] In addition, the State has now identified some 819 illicitly obtained Church documents in its possession, including the most sensitive religious material, *e.g.*, letters to the ministry, membership mailing lists, attorney-client communications, and donation statements.

c. In all of these continuing destructive proceedings, the underlying First Amendment issues remain identical with those now before the Court. In view of the continuing injury to the Church and the destruction of the First Amendment rights of all Petitioners the only question is whether there shall be judicial review now or judicial autopsy later.

B. The Matter Is Final and Ripe for Review.

There is "[n]o self-enforcing formula defining when a judgment is 'final' " for purposes of review by this Court. (*Republic Gas Co. v. Oklahoma,* 334 U.S. 62, 67 (1947).) "This Court has been inclined to follow a 'pragmatic approach' to the question of finality." (*Bradley v. Richmond School Board,* 416 U.S. 697, 722, n. 28 (1974); *Cohen v. Beneficial Loan*

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[2]The State's assertion at page 24 of its brief that Mr. Rader has invoked the Fifth Amendment right against self-incrimination is false. The true facts are that the Attorney General read a *Miranda* warning to Mr. Rader, advising him of his right to remain silent, and Mr. Rader elected to do so. (Transcript of Deposition, April 3-4, 1979, pp. 97-100.) The Attorney General then sought and obtained an order compelling Mr. Rader to resume his deposition and should he wish to assert the Fifth Amendment, to do so on a question-by-question basis. Mr. Rader declined to resume his deposition or to assert the Fifth Amendment because, among other reasons, were he to do so he could be barred under California law from testifying at trial on behalf of the Church. (See *A & M Records, Inc. v. Heilman,* 75 Cal.App.3d 554, 142 Cal.Rptr. 390 (1977).)

Corp., 337 U.S. 541, 546 (1948); see *North Dakota Pharmacy Bd. v. Snyder's Stores*, 414 U.S. 156, 160-164 (1973).) To employ a mechanical test of finality as urged by the State would be to forsake the intensely practical approach adopted by this Court. (See *Mathews v. Eldridge*, 424 U.S. 319, 331, n. 11 (1976).)

A final decision "does not necessarily mean the last order possible to be made in a case." (*Gillespie v. United States Steel Corp.*, 379 U.S. 148, 152 (1964); *Bradley v. Richmond School Board, supra*, 416 U.S. 696, 722, n. 28.) Nor is a judgment by the highest court of a state any less final because rendered in an original proceeding, *Hartman v. Greenhow*, 102 U.S. 672, 676 (1881), or upon application for extraordinary relief (*ibid.*) [mandamus]; *Madruga v. Superior Court*, 346 U.S. 556 (1954) [prohibition]; *Rescue Army v. Municipal Court*, 331 U.S. 549 (1947) [same]; *Michigan Central R. Co. v. Mix*, 278 U.S. 492 (1929) [same]. Petitioners have sought and been denied relief by the highest court of California; the requirements of finality have been met.

While Petitioners believe that technical standards of finality are thus satisfied in this case, there can be no reasonable doubt of finality when reference is made to the "core principle" of that rule: "[*S*]*tatutorily created finality requirements should*, if possible, *be construed so as not to cause* crucial collateral claims to be lost and potentially *irreparable injuries to be suffered. . . .*" [*Mathews v. Eldridge, supra*, 424 U.S. 319, 331, n. 11; (emphasis added.) (See *Republic Gas Co. v. Oklahoma, supra*, 334 U.S. 62, 68 ["T]he court has entertained an appeal . . . because the controversy had proceeded to a point where a losing

party would be irreparably injured if review were unavailing."][3] The State has already successfully asserted its authority over the Church. The devastation wrought by the State continues. If no relief is forthcoming now the overreaching pressure of the State may result in victory by attrition where there could be no victory by law.

The very cost of defending this grossly unconstitutional action threatens the right of religious freedom. (See *Dombrowski v. Pfister*, 380 U.S. 479, 487 (1965); *Time, Inc. v. McLaney*, 406 F.2d 565, 566 (5th Cir. 1969).) Indeed, it now plainly appears that the State has previously overborne the will of other religious organizations, successfully asserting a general supervisory power over their affairs.[4]

On technical and pragmatic grounds, therefore, this case is properly before the Court. (See *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 483 (1975); *Construction Laborers v. Curry, supra*, 371 U.S. 542, 548-551; *Republic Gas Co. v. Oklahoma, supra*, 334 U.S. 62, 68; *Nebraska Press Assn. v. Stuart*, 423 U.S. 1327, 1329 (1975) (Blackmun, J., in chambers); also, *New York v. Cathedral Academy*, 434 U.S. 125, 128, n. 4 (1977); *National Socialist Party v. Skokie*,

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[3]This Court is entitled to look to the whole record in determining questions of finality. (*Construction Laborers v. Curry*, 371 U.S. 542, 551 (1963); *Pope v. Atlantic Coast Line R. Co.*, 345 U.S. 379, 382 (1953).)

[4]Petitioners have recently learned of a letter from the State Attorney General to California State Assemblyman Ivers, dated January 31, 1979, in which it is stated "There are, of course, other cases in which this office has involved itself in the supervision of assets held by religious corporations, many of which were resolved short of trial and appeal."

432 U.S. 43 (1977); *Abney v. United States*, 431 U.S. 651, 657-660 (1977).)[5]

II

THE STATE IS IN FACT ASSERTING A GENERAL SUPERVISORY POWER OVER THE AFFAIRS OF CHURCHES. THERE IS NO LEGAL JUSTIFICATION FOR THIS WHOLESALE INVASION OF FIRST AMENDMENT RIGHTS.

A. The Facts Show the State Is Seeking to Establish and Exercise Unlimited Supervision of the Affairs of the Church.

The State is justifiably reluctant to admit the nature of its assault on the Church. The action is described at one point as designed to protect the Church from fraudulent misappropriation (Opposition, p. 2), at another as an effort to enforce corporation laws (Opposition, p. 15), and at a third as an instance of State supervision of "charitable trusts." (Opposition, pp. 16-20.)

The record shows that it is really the last of these bases on which the State acts. From the outset the

[5]The State's undifferentiated appeal to the doctrine of abstention is completely out of place in this proceeding. The *Younger v. Harris*, 401 U.S. 37 (1971) type of abstention described by the State is fundamentally inapplicable since this Petition arises out of proceedings in the state courts, not from a federal suit intruding on an action under way in a state court. (See *Colorado River Water Cons. Dist. v. United States*, 424 U.S. 800, 816-817 (1976).) Accordingly, although there is abundant evidence that the State is not proceeding in good faith, Petitioners decline the State's invitation to pursue this collateral abstention issue.

Nor are any of the other branches of the abstention doctrine relevant. (See, generally, 17 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure*, §4241, p. 429 *et seq.*) (1978). The State's abstention argument emanates from either confusion or obscurantism. In either case it cannot alter the fact that the federal constitutional questions raised by the State's wholesale intervention into religion are properly before this Court.

State argued that the property of the Church "always and ultimately rests in the Court's custody", that the Church was "always and ultimately subject to the supervision of the Court. . . . In effect, there are no private interests." (R.T. Jan. 2, p. 3.) These consequences follow simply from the State's reasoning that members' tithes or other contributions to a religious organization are *ipso facto* charitable and the organization therefore holds its assets in "public or charitable trust."

If events to date did not already amply testify to the breadth of the power asserted by the State, reference to the First Amended Complaint (Opposition, Appendix A) would:

1. The State asserts that the Church and its related organizations hold their assets *"subject to supervision by the Attorney General"* and by the state courts, that none of the Petitioners has any proprietary interest in the assets of the Church "nor in their books and records," and that the Church is "required by law to account to the public and this Court for all funds received, expended or held by [it]. . . ." (Paras. 10, 11.) (Emphasis added.)

2. The State asserts that efforts by individual Petitioners to protect the Church's books and records against intrusion by the State constitutes a basis for removing them from Church office. (Paras. 18, 20.)

3. The State seeks cancellation of contracts between the Church and individual Petitioners. (Para. 21.)

4. The State requests that individual Petitioners "should be perpetually enjoined and restrained from serving as officers or directors" of the Church. (Para. 22.)

5. The State requests that the form of Church governance be changed by court decree. (Paras. 24, 25.)

6. The State seeks an order requiring that the proceeds from the sale of the College's Big Sandy, Texas campus be used exclusively for charitable and educational purposes, thereby presumably excluding use of said funds for religious purposes. (Para. 31.)[6]

The same sweeping claim of authority appears in the Attorney General's brief to this Court (for example, see Opposition, p. 2, Para. 2, and pp. 16-20).

If, as the Attorney General erroneously believes, California Corporations Code section 9505 or the broader common law theory relating to charitable trusts applies to religious organizations merely because they are supported by members' donations, the State would need no charges of misappropriation to demand that Church records be submitted for inspection, or to pass on whether Church expenditures are for proper religious purposes, or to do anything else, including assuming operation of the Church, in furtherance of its supervi-

[6]In a document filed in the trial court entitled Plaintiff's Opposition to Application for Leave to Intervene by Ad Hoc Committee, page 8, the State asserts that ". . . church funds must be used exclusively for the religious purposes of the Worldwide Church of God, Inc.; college funds must be used exclusively for the educational purposes of Ambassador College, Inc.; and foundation funds must be used exclusively for the cultural purposes of Ambassador International Cultural Foundation, Inc."

Inasmuch as the Church is virtually the sole source of financial support of the College (whose students are educated for the ministry) and the principal support of the Foundation (which serves to introduce the Church to the general public through its good works [based on the biblical directive "Let your light to shine before man, that they may see your good works, and glorify your Father which is in heaven." Matthew 5:16]), the State's declared objective in this case would destroy the College and the Foundation and strip the Church of two of the principal institutions through which it accomplishes its religious mission.

sory power.[7] And, indeed, when the State's specific charges of wrongdoing were quickly refuted by the facts[8] the "charitable trust" doctrine substituted for evidence of wrongdoing.[9] While the State continues to repeat already discredited charges, and occasionally attempts to exalt additional innuendo into justification for its actions,[10] the simple fact remains that the

[7]In the Attorney General's letter to Assemblyman Ivers he put the matter thus: "In the eyes of the law, each [Church, College and Foundation] is deemed to be a charitable organization, holding its assets in trust for the public good. [¶] In recognition of the public interest in charities, it has been consistently held by the courts that the state, [*sic*] has the duty and obligation to oversee the handling of their assets."

[8]We remind the Court that at the original *ex parte* proceeding on January 2, the Attorney General alleged massive liquidation of Church properties below value and destruction of Church records. When these two matters were subsequently heard, the trial court found that neither accusation was supported by the evidence (R.T. Jan. 10-12, pp. 385-386 ["I don't believe from the state of the evidence that the plaintiff has made any real showing of any substance that properties have been sold below market value. The declarations which were filed by the plaintiff in this regard have indulged in sheer speculation, conclusion and hearsay regarding the sales, and those are contrary to the specific declarations of the defendants. . . ."]; R.T. Feb. 21, pp. 135-136 ["If there is some demonstration that those records have been fooled around with, I haven't heard it yet."].)

[9]The trial court confirmed the receivership for the erroneous reason that "perhaps a trier of fact in the future . . . will determine that there is some possibility of truth to these charges, ..." (R.T. Jan. 10-12, p. 385).

[10]The State is fond of adding "color" to the facts by lending sinister connotations to certain transactions involving Petitioner Rader and the Church (Opposition, p. 4). The State refrains from explaining that the transactions took place over many years, both before and after Mr. Rader joined the Church as an officer or member, that these transactions were entirely unrelated to the subject of the receivership, that the very limited testimony regarding them before the court was admitted only as "background" (R.T. Jan. 10-12, p. 153), and that when Petitioners' counsel advised the court he felt compelled to demonstrate the true complete facts regarding the transactions he was cut off by the court (R.T. Jan. 10-12, pp. 162-163, 199-203).

action is one to bend the Church into submission. If it will not bend, it must break.[11]

It is as absurd to describe the court-imposed receivership of the Church as "a very limited receivership" as it is disingenuous to seek to justify it as a means of "safeguarding financial records and preventing any continuing misappropriation of funds." (Opposition, pp. 5-6.)[12] The State's basic premise is that it has a general supervisory power over the affairs of religious organizations, and on this premise it needs no reason whatsoever to inspect Church documents, pass on the propriety of expenditures, etc. By the simple device of labelling the Church a "public or charitable trust" the State has accomplished what for two hundred years has been forbidden by the First Amendment—the merger of Church and State.

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[11]One of the Deputy Attorneys General involved in the case stated early on that "If our court system doesn't work very well in this case, it is going to eat up the assets" of the Church. He explained that if this happened it would be the fault of the Church leadership, not the State. "They have it within their power to resolve this thing. They could end it immediately"—by cooperating with the State. (Seiler, "Church-State Clashes Take New Channel," *Los Angeles Times,* Feb. 11, 1979, p. 1, col. 1, at p. 32, col. 1.)

[12]A more realistic view of the State's actions in this case appears in Wiley, "A Constitutional Outrage," *Liberty,* Vol. 74, No. 3, p. 1 (May-June, 1979).

B. The State of California Has No Legitimate Interest in Exercising a General Supervisory Power Over Churches. Nor Does the State's Interest in Enforcement of Corporation Laws or in Prevention of Fraud by Individuals Support This Action Against the Church.

1. Only a Compelling State Interest Can Justify Any Interference With First Amendment Religious Freedoms.

The Establishment Clause of the First Amendment commands there should be no law "respecting an establishment of religion." "A given law might not *establish* a state religion but nevertheless be one 'respecting' that end in the sense of being a step that could lead to such establishment and hence offend the First Amendment." (*Lemon v. Kurtzman,* 403 U.S. 602, 612 (1971).) The decisions of this Court dictate "that to pass muster under the Establishment Clause the law in question, first, must reflect a clearly secular legislative purpose [citation], second, must have a primary effect that neither advances nor inhibits religion [citations], and, third, must avoid excessive entanglement with religion [citation]." (*Committee for Public Education v. Nyquist,* 413 U.S. 756, 773 (1973).)

The Free Exercise Clause has a reach of its own. (*Gillette v. United States,* 401 U.S. 437, 461 (1971).) The free exercise of religion guaranteed by the First Amendment is one of those fundamental rights and liberties protected against state encroachment except for the most compelling reasons. (*Cantwell v. Connecticut,* 310 U.S. 296, 303 (1940).) "The essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate

claims to the free exercise of religion." (*Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972).) "The conduct or actions so regulated have invariably posed some substantial threat to public safety, peace or order." (*Sherbert v. Verner*, 374 U.S. 398, 403 (1963).) And even then the State may support its actions only by demonstrating "that no alternative forms of regulation would combat such abuses without infringing First Amendment rights" (*id.* at p. 407, n. omitted).[13]

The action undertaken by the State of California violates both Religion Clauses by interfering with the freedom of the Church to be governed according to its understanding of Gospel, requiring explanation and justification of religious expenditures, physically removing control of Church operations from Church officers, and forcing unlimited disclosure of Church documents. As we next demonstrate, this action is not capable

[13]Thus, whether analyzed in free exercise or establishment terms, state intervention in religion requires far more than that the action "advance a rational and secular governmental purpose" (Opposition, p. 23). The cases cited by the State are not to the contrary. In both *Johnson v. Robison*, 415 U.S. 361, 384-385 (1974) and *Gillette v. United States*, *supra*, 401 U.S. 437, 462, there was at most only an "incidental burden" on the free exercise of religion, strictly justified in each case by "substantial governmental interests" "of a kind and weight" so as to sustain the challenged legislation relating to the constitutional grant of power to raise and support armies.

Prince v. Massachusetts, 321 U.S. 158 (1944) has been accorded narrow scope as an illustration of an instance wherein religious conduct was subject to regulation because it posed a substantial threat to public safety, peace or order. (See *Wisconsin v. Yoder*, *supra*, 406 U.S. 205, 230; *Sherbert v. Verner*, *supra*, 374 U.S. 398, 403.)

Braunfeld v. Brown, 366 U.S. 599 (1961) has been implicitly overruled and does not merit discussion. (See *McDaniel v. Paty*, 435 U.S. 618, 633, n.6 (1978) (Brennan, J., concurring) [Noting that to the extent *Braunfeld* conflicts with *Sherbert*, *Braunfeld* was overruled].)

of constitutional justification on any of the bases suggested by the State.

2. The State's Exercise of a General Supervisory Power Over the Affairs of Churches Is Plainly Violative of the First Amendment Religion Clauses.

The Church acknowledges the beneficial societal effects of religion and the right of a state to confer tax-exempt status on religious organizations in recognition of such effects. (See *Walz v. Tax Commission*, 397 U.S. 664, 672-673 (1970).) It is ironic, however, that the State would reason from this premise that religious organizations are automatically subject to state supervision and control. In a related context, this Court recently observed that the fact a religious organization operated summer camps did not mean the property was held as "the public's trustee." To the contrary, "as [a] private entity, [a church] is free to allocate its resources to serve its own institutional objectives. which may or may not correspond with community needs." (*United States v. 564.54 Acres of Land*, ... U.S. ....., 60 L.Ed.2d 435, 444 (1979).)[14]

Manifestly, the State's argument would prove too much. If the State had the right to supervise Church affairs it indeed could permanently install a deputy in the Church for this purpose, pass on the propriety of Church expenditures before the fact as well as after, and make the Church a petty bureaucracy in fact as well as in theory.

[14]This concept of religious institutional freedom may be contrasted with the State's professed indignance that the Church should decide to reduce the size of the College to return it to its fundamental purpose of training persons for the ministry. (Opposition Appendix A, pp. 4, 17.)

The Church acknowledges it does good works. Indeed, it is devoted to God's work, and charity is one of the highest Christian virtues. (See *Wisconsin v. Yoder, supra,* 406 U.S. 205, 215-216, 220 ["[I]n this context belief and action cannot be neatly confined in logic-tight compartments"].) But while the State of California, like many other states and nations, may be grateful for the Church's work, the Church does not for that reason become a branch of the State's system of social welfare. Church members do not tithe to a grand community chest; they support a religious mission. This cannot be erased by labelling the Church a charity, public or charitable trust, or simply a nonprofit corporation.

Clearly, California's assertion of a limitless supervisory power based on its characterization of the Church as a "charitable trust" is no more adequate than Wisconsin's appeal to the *"parens patriae"* concept in *Wisconsin v. Yoder, supra,* 406 U.S. 205. Indeed, it seems the former concept is only a variant of the latter, since the State invokes in this case *People v. Cogswell,* 113 Cal. 129, 136, 45 P. 270 (1896) ("The state, as *parens patriae,* superintends the management of all public charities or trusts. . . .") against religious organizations. What this Court said in *Wisconsin v. Yoder* applies *a fortiori* to this case (at p. 234):

> "In the face of our consistent emphasis on the central values underlying the Religion Clauses in our constitutional scheme of government, we cannot accept a *parens patriae* claim of such all-encompassing scope and with such sweeping potential for broad and unforeseeable application as that urged by the State."

This broad conceptualization of "charitable trusts" has no bounds. At the least, it must result in a "comprehensive, discriminating, and continuing state surveillance" in violation of the Establishment Clause. (See *Lemon v. Kurtzman, supra,* 403 U.S. 602, 619.) "Government may not engage in programs or enact laws that require extensive surveillance by civil authorities of the activities of religious institutions, since such surveillance entails the risk of entangling the State in matters of religious significance." Kauper and Ellis, "Religious Corporations and the Law", 71 *Mich. L. Rev.* 1499, 1568 (1973).

In any case, the concept does not explain its purpose. If there is a compelling state interest it must be embodied in the conclusion that a "charitable trust" is subject to state supervision and control.[15] Whatever the law may be in countries with established religions, a general supervisory power over religious organizations cannot co-exist with the First Amendment. In California, it is the First Amendment which has been forced to yield.

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[15]If, as the State contends, under state law only the State had standing to inquire into the affairs of a religious organization, clearly state law of standing rather than the First Amendment would have to give way. (See *Jones v. Wolf,* .... U.S. ...., ... (1979) (Slip opn. p. 12) ["the State may adopt any method of overcoming the majoritarian presumption, so long as the use of that method does not impair free exercise rights or entangle the civil courts in matters of religious controversy." (n. omitted)].) As a matter of fact, however, if the ordinary rules relating to charitable trusts applied to religious organizations, "responsible individuals" would have standing to sue to enforce a trust. (*San Diego etc. Boy Scouts of America v. City of Escondido,* 14 Cal.App.3d 189, 195, 92 Cal.Rptr. 69 (1971).) In the instant case, the State has to date successfully opposed intervention by such responsible individual church members.

3. The State Is Not Seeking Merely to Enforce Corporation Laws. In Any Case, Such a Purpose Cannot Justify These Proceedings.

This action by the State was not undertaken to compel compliance with its corporation laws, notwithstanding the State's suggestion that the Church could have avoided State intervention in its affairs by not incorporating or by incorporating in a different form (Opposition, p. 27). On the contrary, the State's position is that "the Attorney General could take the same enforcement action as it is taking in the instant case with regard to an unincorporated church, and the fact that the Church has incorporated does not subject it to any more stringent supervision by the Attorney General than would otherwise be the case". (Plaintiff's Opposition to Demurrer to First Amended Complaint, filed June 28, 1979, p. 25.)

But even at face value the State's position raises insuperable constitutional questions: Can the State constitutionally condition incorporation by a religious organization on waiver of First Amendment rights to choose the form of church governance?[16] Does the State deny equal protection of the laws by permitting nonprofit incorporation to congregational but not hierarchical religious organizations or by supervising nonprofit religious corporations but not corporations sole or unincorporated religious associations? (See generally, Kauper and Ellis, *supra,* 71 *Mich. L. Rev.* at p. 1564 *et seq.*)

[16]"Transferred to a political context, the authoritarian structure of the Roman Catholic Church, for example, would be anathema to many Americans; but it ill behooves the courts to impose secular, political norms on church structures." (Note, 75 *Harv. L. Rev.* 1142, 1176 (1962), n. omitted.)

These questions would be squarely framed if the State brought an action in *quo warranto* to revoke the Church's corporate charter. If the State really seeks to enforce its corporation laws that is the obvious mechanism for doing so. But that is clearly not what the State has in mind. It really seeks and has succeeded in asserting a general supervisory power over the affairs of a religious organization.

That the Church is incorporated does not change the fact it is a church, any more than "an itinerant evangelist . . . become[s] a mere book agent by selling the Bible or religious tracts" (*Murdock v. Pennsylvania,* 319 U.S. 105, 111 (1943)). Indeed, any approach which would call a nonprofit religious corporation only a corporation and thereby cast aside all First Amendment concerns has long been repudiated by this Court. In *Kedroff v. St. Nicholas Cathedral,* 344 U.S. 94 (1952), Justice Jackson in dissent contended for just such an analysis, arguing (at p. 128): "When it sought the privilege of incorporation under the New York [Religious Corporations] Law applicable to its denomination, it seems to me that this Cathedral and all connected with its temporal affairs were submitted to New York Law." To him, the action was "an ordinary ejectment action involving possession of New York real estate." Not one other member of the Court endorsed this view.

Yet this is precisely the approach asserted by the State when it suits its convenience.[17] The State's claim

[17]The State's convenience changed again in a July 17, 1979 letter from the Attorney General to the California Supreme Court. There the Church is said to be involved in the action only as an "indispensable party" in light of the relief sought by the State.

that the action seeks removal of individuals from corporate but not ecclesiastical office is a perfect example. The "temporalities" are necessarily part and parcel of the religious nature of the organization. "It is plain that a religious organization needs funds to remain a going concern" (*Murdock v. Pennsylvania, supra,* 319 U.S. 105, 111); those funds are used to further *religious* goals, and the determination of what those goals are and how they should be furthered are *religious* determinations. Obviously a board of directors of a religious corporation must act with reference to religious aims.

It is simply sophistical to argue that the Church as a spiritual body may be run without reference to the Church as a corporation. Control of Church finances means control of the Church.

4. The State May Act to Prevent Fiscal Fraud Without Destroying the Church and Trampling the First Amendment.

It seems that the heart of the "charitable trust" theory advanced by the State is an interest in the prevention of fraud and misappropriation. Such an interest is clearly protected by the California Penal Code, and if the State has reasonable cause to believe a crime has been committed by Church officers, the State may proceed criminally against them. The State cannot, however, justify destruction of the Church to reach alleged wrongdoers. After all, the State claims the Church and its membership have been victimized, why should they be the victims of this action?

This Court has previously disposed of a comparable claim that a State's intervention in religious affairs was warranted as a means of preventing fraud. In *Cantwell v. Connecticut, supra,* 310 U.S. 296, several

Jehovah's Witnesses were convicted of violating a state law requiring a certificate as a condition of soliciting support for their religious views. "The State insist[ed] that the Act . . . merely safeguards against the perpetration of frauds under the cloak of religion." This Court reasoned (at pp. 304-305), "Conceding that this is so, the question remains whether the method adopted by Connecticut to that end transgresses the [religious] liberty safeguarded by the Constitution" and held the statute invalid. *Cantwell* clearly indicated the appropriate remedy for fraud (at p. 306): "Nothing we have said is intended even remotely to imply that, under the cloak of religion, persons may, with impunity, commit frauds upon the public. *Certainly penal laws are available to punish such conduct.*" (Emphasis added.) (And see *United States v. Ballard,* 322 U.S. 78 (1944).)

This very point had been made years earlier in the context of one of the notorious Mormon cases. In *Davis v. Beason,* 133 U.S. 333 (1890), the Court discussed the necessity for religious freedom to yield at some point to the fundamental demands of society (at pp. 342-343):

> "However free the exercise of religion may be, it must be subordinate to the *criminal laws* of the country, passed with reference to actions regarded by general consent as properly the subjects of *punitive legislation.*" (Emphasis added.)

In *Kedroff v. St. Nicholas Cathedral, supra,* 344 U.S. 94, the State of New York had enacted legislation making all New York churches formerly subject to the administrative jurisdiction of the Patriarch of Moscow into an administratively autonomous district to be governed by a local American hierarchy. This legisla-

tion was apparently motivated by fear of Soviet control of the Church. This Court condemned the legislation as unconstitutional under the First Amendment, noting (at pp. 109-110): "Legislative power to punish subversive action cannot be doubted. If such action should be actually attempted by a cleric, neither his robe nor his pulpit would be a defense. But in this case no problem of *punishment for the violation of law* arises. . . ." (Emphasis added.)

In *Schneider v. Irvington,* 308 U.S. 147 (1939), a Jehovah's Witness was convicted of violating an ordinance prohibiting unlicensed door-to-door canvassing. Reversing the conviction on the grounds of the ordinance's unconstitutionality, it was stated (at p. 164):

> "Conceding that fraudulent appeals may be made in the name of charity and religion, we hold a municipality cannot, for this reason, require all who wish to disseminate ideas to present them first to police authorities for their consideration and approval, with a discretion in the police to say some ideas may, while others may not, be carried to the homes of citizens; some persons may, while others may not, disseminate information from house to house. *Frauds may be denounced as offenses and punished by law.* Trespasses may similarly be forbidden. If it is said that these means are less efficient and convenient than bestowal of power on police authorities to decide what information may be disseminated from house to house, and who may impart the information, the answer is that considerations of this sort do not empower a municipality to abridge freedom of speech and press." (Emphasis added.)

The short answer, then, to the State's claim of fraud prevention as a basis for this suit is that the First Amendment nonetheless bars action which gratuitously invades religious liberty. If the State has reasonable cause to believe fraud has been committed, it can proceed criminally against the alleged wrongdoers. The State simply cannot justify taking over the Church, poring through all of its records—destroying it—to get at individuals.[18]

In sum, no compelling state interest supports this action. To the extent the action is authorized by California Corporations Code section 9505, the statute is unconstitutional. To the extent the action rests on some common-law basis, the common law must yield to the First Amendment. To the extent the State is investigating criminal violations, it must pursue criminal procedure.

Conclusion.

It could once fairly be said that ours is a religious country. However, in this post-Jonestown era religious scholars see an antireligious attitude holding sway, a suspicion of religious organizations, and a reluctance to speak out for religious freedom. Historically, it is exactly in such times that the oppressed have sought and found in the pronouncements of this Court a reaf-

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[18]The State does not and cannot justify seeking (and forcibly obtaining) disclosure of all Church documents including membership lists, thereby invading Church members' rights of privacy and freedom of association.

firmation of the basic principles of freedom under the Constitution.

Petitioners respectfully submit that it is again incumbent on this Court to declare that the religious liberty guaranteed by the First Amendment obtains even in the State of California.

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